No. 96-1059

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In The

Supreme Court of the United States

October Term, 1996

SYCUAN BAND OF MISSION INDIANS;
MORONGO BAND OF MISSION INDIANS;
SANTA ROSA BAND OF TACHI INDIANS;
CACHIL DEHE BAND OF WINTUN INDIANS
OF THE COLUSA INDIAN COMMUNITY;
SOBOBA BAND OF MISSION INDIANS;
ROBINSON BAND OF POMO INDIANS,

Petitioners,

v.

PETE WILSON, Governor of the State of California; and the State of California,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF IN OPPOSITION

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QUESTION PRESENTED FOR REVIEW

Whether certain gaming activities proposed to be conducted by Petitioner Tribes on Indian lands in California are permitted in California, within the meaning of 25 U.S.C. § 2710(d)(1)(B), where the proposed gaming activities are categorically forbidden to all others under state law.

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STATEMENT OF THE CASE

In general, the State Respondents[1] agree with the statement of facts set out in the Petition. However, the following clarifying remarks are offered.

The following facts cannot be disputed: California law expressly and absolutely forbids the conduct of banked or percentage games played by cards, dice, or device, Cal. Pen. Code § 330, and California law expressly forbids gambling by use of "slot machines," as defined by state statutes. Cal. Pen. Code §§ 330a, 330b, 330.1.[2] The

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[1] The term "State Respondents" will be used to include both the State of California and Governor Pete Wilson.

[2] The District Court declined to reach the question whether the on-line computer terminals employed by the California State Lottery amount to "slot machines" as defined by section 330b(2) of the California Penal Code Pet. App. 49, n. 20. Contrary to Petitioners' assertion, Pet. 6, n. 4, the District Court did not "assume" that the terminals constitute slot machines. Rather, the court opined that, however the State's terminals might be characterized, the Tribes are entitled to employ similar equipment, Pet. App. 49, n. 20 – a proposition that the State Respondents had never denied. Before the Court of Appeals, the State Respondents objected to the District Court's statement that there are "substantial similarities" between the State's equipment and the devices proposed to be operated by the Tribes, on the ground that the statement was wholly unsupported by any record evidence. *See, id.* The Court of Appeals thus remanded the matter to the District Court "to consider the limited question of whether California permits the operation of slot machines in the form of the state lottery or otherwise." Pet. App. 23. The State Lottery contends that their terminals do not constitute "slot machines," but that, if they were slot machines, the state-law prohibitions against such devices would apply to that agency as to others. *See, Western Telcon, Inc. v. California State Lottery,* 13 Cal.4th 475, 483 (1996).

proceedings in the District Court were commenced in response to a disagreement between the Tribes and the State over the question whether certain class III gaming activities proposed to be conducted by the Tribe – *viz.*, electronic gambling devices and banked and percentage card games, Pet. App. 11[3] – are – "permitted" in California for purposes of 25 U.S.C. § 2710(d)(1)(B). Pet. App. 13. The Tribes did not dispute that the electronic gambling devices they proposed to offer amounted to "slot machines" prohibited by section 330b of the California Penal Code. Pet. App. 47 n. 18, nor was there any dispute that the Tribes also proposed to offer banked and percentage card games, Pet. App. 11, games that are expressly prohibited by state law. *See* Cal. Pen. Code § 330.

The State took the "straightforward" position, Pet. App. 14, that, because the Tribes' proposed gaming activities are unequivocally prohibited in California, *see* Cal. Pen. Code §§ 330, 330a, 330b,[4] they are not "permitted" in

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If, however, Petitioners were to prevail on remand with respect to the state-law question, they would have satisfied the test under 25 U.S.C. § 2710(d)(1)(B). There is no dispute that the Petitioners may engage in any form of gambling that is, in fact, permitted elsewhere in the State.

[3] Reference is to page 11 of the Appendix to the Petition for Writ of Certiorari.

[4] Petitioners somewhat inaccurately assert that "the district court determined that some of the forms of Class III gaming requested by the Tribes (house-banked and percentage card games) were *not expressly authorized* by state law." Pet. App. 7 (italics added). In fact, the District Court noted that such gaming activities are *prohibited* by state law, and the court further noted that the Tribes do not dispute this point. Pet. App. 49; *see also*, Pet. App. 29 ("The State has consistently maintained

California within the meaning of IGRA, 25 U.S.C. § 2710(d)(1)(B). The Tribes contended, in contrast, that the express prohibitions of state law are not determinative of the question whether the proposed activities are permitted in California. Rather, the Tribes argued, all gambling activities – including those expressly prohibited by state law – are permitted in California for purposes of IGRA, because California has a general "regulatory" policy towards gambling. Pet. App. 14. As support for this Proposition, the Tribes rely on language found in *California v. Cabazon Band of Mission Indians*, 480 U.S. 202 (1987). *Id.*

Throughout these proceedings, the Tribes have confused the federal-law dispute by simply *pronouncing* certain gaming activities to be "banked" or "percentage" gaming, *see, e.g.*, Pet. 6, n. 4, or by *pronouncing* that online computer terminals used by the state-operated lottery to be "slot machines." In this way, the Tribes seek to suggest that they propose only to offer gaming activities that *are* engaged in by others in the State.[5]

The State has never denied that Petitioners may engage in any gaming activities that are conducted by any other person or entity in California. The instant action was initiated by Petitioners because the Tribes seek

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a strong public policy prohibiting casino gambling, including banking card games and percentage card games. Accordingly, such games are prohibited in California, are against the State's public policy, and may not be operated by Tribes.")

[5] The action below was commenced as an action for declaratory relief, brought by stipulation of the parties to resolve a question of law. Petitioners never alleged that the State has refused to negotiate about gaming activities conducted by others in California.

to engage in gaming activities that *are not*, in fact, conducted by others in California.[6] The issue, therefore, is not whether *others* in California are engaged in banked or percentage gaming; that question is an ordinary factual dispute involving construction of state law.[7] The issue

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[6] Petitioners' device of *characterizing* off-reservation gaming activities to be lawfully conducted banked and percentage games or slot machines is, thus, a disingenuous means of distracting the courts from the real, and only, federal issue in this case: Is a gaming activity "permitted" in California within the meaning of 25 U.S.C. § 2710(d)(1)(B), when the gaming activity is absolutely forbidden to all persons elsewhere in the state under state law?

[7] It is the question presented, for example, in *Western Telcon, Inc.*, 13 Cal.4th 475. That action was commenced by California horsemen and cardroom investors to enjoin the conduct of Keno by the California State Lottery. Plaintiffs in that action alleged that Keno is a banked game played by device, prohibited by section 330 of the California Penal Code, and that, offered as an on-line game, Keno amounts to a slot machine prohibited by section 330b of the Penal Code. The California-Nevada Indian Gaming Association (CNIGA), of which Petitioners are members, intervened in that action for the purpose of arguing that, even if Keno were a banked game or amounted to a slot machine, the game would nevertheless be permissible because, the Tribes argued, the State Lottery is *exempt* from the statutory prohibitions against banked games played by device. *Western Telcon, Inc.*, 13 Cal.4th at 495 ("CNIGA contends [that] the Lottery Act grants CSL a complete exemption from the antigaming provisions of chapter 10.") In this way, the Tribes hoped to support their contention in federal court that banked and percentage games are permitted in California. The California Supreme Court, however, rejected the Tribes' contention and struck down the Keno game as unlawful. The state court ruled that the California State Lottery has authority only to offer lottery games within the meaning of the State Lottery Act. *See* Cal. Gov. Code 8880.12.

presented to the federal courts for adjudication by the parties was whether, under the Indian Gaming Regulatory Act (IGRA), Petitioners are entitled to engage in gaming activities that are *indisputably prohibited* to all others by state law.[8]

ARGUMENT

I. THE PETITION FOR WRIT OF CERTIORARI SHOULD BE DENIED

A. There Is No Disagreement Among The Circuits On The Question Whether 25 U.S.C. § 2710(d)(1)(B) Authorizes Tribes To Engage In Gaming Activities That Are Categorically Prohibited Under State Law

As noted above, the federal issue presented by the parties to the litigation concerns the Tribes' claim of

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[8] By their self-serving pronouncements that games being played by some in California are "banked games" or "percentage games" within the meaning of California law, Petitioners also seek to create an *illusion* that California permits some forms of banked or percentage gaming while prohibiting others, thereby attempting to lend credence to their contention that California's policy towards banked and percentage games is "regulatory." But, again, Petitioners' claim is only illusory. If, in fact, banked and percentage games are lawfully being played by others in California by virtue of some exemption from the general statutory prohibition, there is no need to reach the question whether California's policy is "regulatory," for the State has never disputed that those gaming activities would also be available to Petitioners pursuant to 25 U.S.C. § 2710(d)(1)(B). There simply is no controversy between the parties over the question whether the Tribes may engage in gaming activities that are, in fact, conducted off-reservation in California.

entitlement to engage in gaming that is forbidden to others under state law. California has never disputed that Petitioners may engage in gaming activities that are conducted by others in the State; whether some in the State are, in fact, permitted to engage in the form of gaming proposed by the Tribes is a simple question of fact not presented by the parties to the federal courts for disposition.

Petitioners misrepresent the state of consensus among the circuits concerning the only federal-law issue presented by these proceedings. No court of appeals other than Ninth Circuit has addressed the question whether 25 U.S.C. § 2710(d)(1)(B) entitles Tribes to engage in activity that is *categorically* prohibited in the State. Other panels of the Ninth Circuit have followed the decision of the Court of Appeals in this case, *see Coeur D'Alene Tribe v. Idaho*, 51 F.3d 876 (9th Cir. 1995), *affirming*, 842 F.Supp. 1268 (N.D. Idaho 1994); *United States v. E.C. Investments*, 77 F.3d 327 (9th Cir. 1996), and the decision has been relied upon by at least one state court for the purpose of ascertaining the parameters of a state governor's powers, under state law, to enter into tribal-state compacts. *State of New Mexico ex rel. Clark v. Johnson*, 904 P.2d 11, 19 (NM 1995).

No other decisions are in conflict with the decision below. *Mashantucket Pequot Tribe v. State of Connecticut*, 913 F.2d 1024 (2d Cir. 1990) involved a tribe's request to conduct casino gaming activities that are *permitted* to others in the state, albeit only for charitable purposes. 913 F.2d at 1026, 1029. It is not at all clear that the Second Circuit would have come to the same conclusion had the Tribes proposed to conduct gaming activities that are prohibited to all within the state, *i.e.*, the premise of the instant litigation. The same is true of *United States v.*

Sisseton-Wahpeton Sioux Tribe, 897 F.2d 358 (8th Cir. 1990), which involved the question of the extent to which state laws regulating blackjack apply on the reservation; the game in question was *permitted* to others in the state, and the issue was genuinely one of *regulation* of that activity.

Lac du Flambeau Band of Mission Indians v. Wisconsin, 743 F.Supp. 645 (W.D. Wisc. 1990), also relied on by Petitioners, is not, of course, the decision of a circuit court, but rather the decision of a single district court judge. The appeal to the circuit court was dismissed by that court as untimely. *Lac du Flambeau Band of Mission Indians v. Wisconsin*, 957 F.2d 515 (7th Cir. 1992). The district court judge's analysis included reasoning that the Wisconsin voters' amendment of the state constitution to permit lotteries had the necessary effect of permitting *all* forms of gambling. *Lac du Flambeau Band*, 743 F.Supp. at 651.

Petitioners' quotation from *Ponca Tribe of Oklahoma v. State of Oklahoma*, 37 F.3d 1422 (10th Cir. 1994) is misleading. As a threshold matter, the decision was *vacated* by this Court and remanded for reconsideration in light of *Seminole Tribe. Oklahoma v. Ponca Tribe*, ___ U.S. ___, 116 S.Ct. 1410 (1996). The appellate court's consideration of the extent to which IGRA imposes obligations to negotiate on states is, therefore, of dubious precedential value. Furthermore, the language quoted by Petitioners concerns, not the meaning of section 2710(d)(1)(B), but rather the impact of *section 2710(d)(3)(A)* for purposes of Tenth Amendment analysis. 37 F.3d at 1434. To the extent that the Tenth Circuit's reasoning could be said to bear on the question presented in the instant case, that analysis is entirely *consistent* with the decision of the Ninth Circuit.

Ponca Tribe recognized that if a state has a policy against gambling that is less restrictive than a wholesale ban on the activity, "nothing in IGRA requires the *state* to surrender or compromise these policies or preferences in attempting to negotiate a compact with the Indian tribe." 37 F.3d at 1434 (italics in original).

Petitioners also make a rather oblique argument that the decision of the Ninth Circuit herein is at odds with the analysis of the Fifth Circuit in *Ysleta del Sur Pueblo v. State of Texas*, 36 F.3d 1325 (1994). But the Fifth Circuit's disquisition on IGRA in that case was manifestly gratuitous dicta. The court held that the action was governed, not by IGRA at all, but rather by the Texas Restoration Act, and, indeed, the court further ruled that the district court lacked jurisdiction under the Eleventh Amendment to entertain the Tribes' claim in the first instance. 36 F.3d at 1335-1336.

In reality, then, the Ninth Circuit's decision in this case stands *uncontroverted* with respect to disposition of a Tribe's claim of entitlement to engage in a form of gambling that is *forbidden to all other persons in the State.*

B. The Judgment Of The Ninth Circuit Is Well-Reasoned And Faithful To The Congressional Intent As Expressed In IGRA Itself

Section 23(a) of IGRA, 18 U.S.C. § 1166(a), assimilates onto Petitioners' Indian lands all state gambling laws, whether "civil" or "criminal." For purposes of federal law on Indian lands, then, Congress has eliminated any need to determine whether a gambling law is "civil-regulatory" or "criminal-prohibitory." As a matter of federal

law, then, sections 330, 330a, and 330b of the California Penal Code apply to Petitioner's activities on Indian lands by virtue of 18 U.S.C. § 1166(a), (b), without regard to the question whether California's policy toward gambling in general should be characterized as "regulatory."

The decision below thus *harmonizes* 25 U.S.C. § 2710(d)(1)(B) and 18 U.S.C. § 1166(a). Application of the plain language of section 2710(d)(1)(B) results in the "level playing field" intended by Congress, *i.e.*, whatever games are played elsewhere in a State may be played on Indian lands in that State, and only those games that are played elsewhere in the State are authorized by Congress for play on Indian lands.

In contrast, Petitioners' construction of 25 U.S.C § 2710(d)(1)(B) would render the statutory scheme virtually unintelligible. Under Petitioners' analysis, slot machines are "permitted" in California for purposes of 25 U.S.C. § 2710(d)(1)(B) – because California's policy toward gambling in general is assertedly "regulatory" – although slot machines are clearly forbidden on Indian lands by the very same state laws, Cal. Pen. Code §§ 330a, 330, as assimilated by Congress onto Indian lands. 18 U.S.C. § 1166(a); *see also* 25 U.S.C. § 2710(d)(6). Petitioners thus contend for, not a "level playing field," but for a *privileged status;* they seek the *unique* capability of being able to engage in a form of gambling that is categorically forbidden to everyone else in the State under every circumstance. Petitioners would thus impress the State into the task of relieving the Tribes from the effects of *Congress'* choice in 18 U.S.C. § 1166(a) to import onto Indian lands the whole of the State's gambling laws.

The Ninth Circuit's decision reflects a logical approach to the question of the scope of gaming permissible on Indian lands in California. It is an approach that is not only straightforward, but harmonizes all provisions of IGRA and faithfully effectuates Congress' purpose to create a level playing field for Tribes desiring to compete with other gaming interests in the State. As the only circuit court opinion to address the application of 25 U.S.C. § 2710(d)(1)(B) in the context of an unqualified statutory prohibition against a gaming activity, the decision below should be left undisturbed.

C. Petitioners Improperly Seek To Employ These Proceedings To Define The Parameters Of The Authority Of The Secretary Of The Interior. The Issue Is Plainly Premature

Petitioners argue that the Court should grant the petition in order to resolve anticipated questions, assertedly left open by the *Seminole Tribe* decision,[9] involving the scope of the Secretary of the Interior's powers under 25 U.S.C. § 2710(d)(7)(B)(vii). But this case clearly does not involve construction of any provision of section *2710(d)(7)(B)(vii);* the meaning of that statute was never briefed below, nor did the Court of Appeals purport to construe that statute. The sole question presented in this case is the meaning of the section *2710(d)(1)(B).* Moreover, the context of these proceedings is not state resistance to adjudication, but rather a good faith effort by the

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[9] *Seminole Tribe of Florida v. State of Florida,* ___ U.S. ___, 116 S.Ct. 1114 (1996).

Tribes and the State to resolve their differences concerning the State's obligation to negotiate about the disputed gaming activities.

This Court's decision in *Seminole Tribe* is, thus, utterly irrelevant to these proceedings, for the rather obvious reason that California *consented* to this action. *See* Pet. App. 26. The possible consequences flowing from a State's *refusal* to consent to suit are, therefore, not in issue. The same is true for Petitioners' suggestion that the Secretary of the Interior might have power *under section 2710(d)(7)(B)(vii)* to permit Tribes to engage in gaming activities over which a State had no obligation *under section 2710(d)(3)* to negotiate in the first instance. When, and if, the Secretary should act in furtherance of such assumed powers, *i.e.*, when the issue is ripe for consideration, the matter will doubtless be litigated and more properly brought before this Court for consideration. *Ponca Tribe of Oklahoma v. Oklahoma*, 37 F.3d at 1434 n. 17.

II. THE COURT SHOULD REJECT THE SUPPORTING RESPONDENT TRIBES' SUGGESTION TO DELAY DISPOSITION OF THE PETITION

The action below was initiated pursuant to a stipulation between the State of California and some 16 Indian Tribes for the purpose of resolving a dispute of law concerning the scope of permissible class III gaming on Indian lands in California. The action was initiated nearly five years ago, in 1992, in the hopes of resolving an impasse in tribal-state compact negotiations. Now that the litigation promises to conclude *adversely to the Tribes*,

nine of the plaintiff Tribes seek further delay in bringing an end to this litigation.

None of the "Nine Respondent Indian Tribes" is presently negotiating with the State of California. Eight of these nine are plaintiffs in this action who elected to open class III casinos prior to resolution of the dispute presented in this litigation; they are presently unlawfully engaged in large-scale casino gambling in California without a tribal-state compact, in violation of the Indian Governing Regulatory Act (IGRA), 25 U.S.C. § 2710(d)(1)(C).[10] The ninth Tribe has initiated litigation against California, in *state court*, to compel negotiations about class III gaming activities at issue in the instant litigation.

The only Tribe presently involved in compact negotiations with the Governor of California, the Pala Band of Mission Indians, is not among those seeking a delay in the disposition of the petition for writ of certiorari.[11] Clearly, the State of California, the other party to the

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[10] The Court is respectfully requested to take judicial notice of this well-known fact in California. F.R.Evid. 201(b). Indeed, in 1996, the State of California initiated litigation against the National Indian Gaming Commission in the United States District Court for the purpose of bringing about enforcement of IGRA's express prohibition against the widespread conduct of un-compacted class III gaming. *California v. Monteau*, E.D.Cal. No. CIV-S-96-797 LKK.

[11] The Pala Band was not a plaintiff in the proceedings below. The nine Tribes appear to be using their status as respondents to make representations on behalf of the non-party Pala Band.

compact negotiations, is not requesting a delay in disposition of the petition.

The State Respondents vigorously disagree with these Tribes' self-serving suggestion that delay in disposition of the petition for writ of certiorari would assist the negotiations between the Pala Band and the State. The State's position is precisely the same now as it was in 1992, when this litigation was initiated: The State will negotiate about any gaming activity that is permitted to anyone else in California; the State will not negotiate about any activity that is forbidden to everyone else in California. The State's position has now been vindicated; uncertainty about the permissible scope of class III gaming on Indian lands in California may finally be laid to rest; and the dispute over scope of permissible gaming need no longer pose an impediment to conclusion of compact with the Pala Band. Denial of the petition for writ of certiorari would, therefore, *further* the cause of concluding a compact with the Pala Band, by eliminating any disagreement over the permissible scope of gaming.

Furthermore, United States Attorneys in California are relying on conclusion of this litigation to resolve uncertainty concerning the permissible scope of gaming on Indian lands in California. *See, e.g., United States v. Rincon Band of Mission Indians*, S.D.Cal. No. CV 95-557(H); U.S. Attorney Alan Bersin, "Resolving the Indian Gaming Problem," *The San Diego Union-Tribune*, Opinion; Ed. B-7, pp. 7, 8 (June 26, 1996). California must rely on the United States Attorneys to enforce Congress' unequivocal intent to preclude commencement of casino gambling without a compact. 25 U.S.C. § 2710(d)(1)(C); *Sycuan Band of Mission Indians v. Roache*, 54 F.3d 535 (9th Cir. 1994). It

is not surprising, then, that the Tribes presently seek to avoid finality of the Ninth Circuit's decision, as they may now have to face the prospect of curtailing their unlawful activities. But, if California is to be denied the ability to enforce its own gambling laws for the protection of its citizens, see 18 U.S.C. § 1166(d), then it is of the utmost importance to the State that there be no unnecessary delay in resolution of this important issue for the guidance of the United States Attorneys.

CONCLUSION

For the reasons stated, the Court is requested to deny the petition for writ of certiorari.

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